be. It is possible, I suppose, that the plaintiff and his faction may have done this in an attempt to spike this, as they describe it, undemocratic election. On the other hand it is possible that the defendants may have been responsible for doing so in order to spoil a ballot paper cast in favour of the plaintiff and his candidates.

Be that as it may it represents yet again another unsatisfactory feature of this election and taken in conjunction with the other matters to which I have referred renders it, not only unsafe, but improper for this election to be allowed to stand.

There is no substance, in my opinion, in the other matters raised by the plaintiff. The time allowed for the casting of votes was, I consider, sufficient and reasonable. I am satisfied that sufficient publicity was given to the holding of this election.

Proper and adequate steps were taken, in my view, to ensure the distribution of ballot papers to all the members. Two members were called who said they were not given a ballot paper but it transpired that one was eight months in arrear with his subscription while the other was eleven months and accordingly neither of them was entitled to vote. It is true that a number of members who were more than three months in arrear with their subscriptions were given ballot papers but that cannot avail the plaintiff now.

He cannot on the one hand seek to set aside this election on the ground that votes were cast by members who were disqualified from voting and then on the other hand be heard to complain that those who were disqualified did not receive a ballot paper and were thereby refused a vote. The plaintiff cannot approbate and reprobate.

The question of the election of trustees, submission of the annual report and statement of accounts to members and failure to place a copy of the external and internal auditors' report in the office of the union are matters for the annual general meeting to consider if and when it is next held. It would at this stage, in my view, be premature for this court to deal with the matter.

In the result therefore, for the reasons I have given, the plaintiff is entitled to judgment.

There will be a declaration that the election is null and void and an order restraining defendants Nos. 2 to 16 and each of them from taking office as the executive committee of the union or from intermeddling in the business of the union or the management of its affairs.

There will also be an order that the 1st defendant proceeds with reasonable despatch to conduct a fresh election to its executive committee in accordance with the rules of the union.

There will be no order as to costs against the 1st and 9th defendants.

Defendants Nos. 2 to 8 and 10 to 16 must pay the plaintiff's costs limited to one half only of his taxed bill.

Order accordingly.

Solicitors: *Donaldson & Burkinshaw; Chor Pee & Hin Hiong.*

MENON v. DITT SINGH

[O.C.J. (MacIntyre J.) August 10, 1966]

[Ipoh — Civil Suit No. 491 of 1964]

Practice and Procedure — Payment into and out of court — Costs — R.S.C., 1957, O. 22 & O. 65.

The defendant had paid a sum in full settlement of the plaintiff's claim into court under O. 22, r. 1(1). The plaintiff instead of applying for payment out within fourteen days of the service of the notice, applied to court for payment out under O. 22, r. 2(3). The defendant consented to the order for payment out, but objected to an order for costs.

Held: the court had a discretion to order costs and in this case the general rule in regard to costs in proceedings of this nature is that the plaintiff is entitled to costs up to the date of payment in and the defendant the costs after that date will be followed.

CIVIL SUIT.

P. P. Dharmananda for the plaintiff.

N. Sharma for the defendant.

Cur. Adv. Vult.

MacIntyre J.: The defendant in this suit paid into court by virtue of Order 22 rule 1(1) of the Rules of the Supreme Court a sum of $2,625 in full settlement of the plaintiff's claim. Notice of payment in as required by the rule was given to the plaintiff but he instead of applying for payment out within 14 days of the service of the notice, in which event he could have obtained the money without recourse to an order of court and would have been entitled, as a matter of course, to tax his bill of cost, chose to make the application for payment out under Order 22 rule 2(3).

Mr. Sharma for the defendant, while consenting to an order for payment out under rule 3, objected to an order for costs. He submitted, that the power of the court under rule 3 is strictly limited to granting or refusing an order for payment out in full satisfaction of the plaintiff's claim in the suit and did not extend to include the exercise of the court's discretionary powers to grant costs under Order 65 rule 1. In this connection he argued that the word "claim" mentioned in rule 3 refers to the object of the claim in the suit and not to the prayer for costs which is only incidental to the claim and contended that the ommission to provide for the

payment of the plaintiff's costs under rule 3 was not accidental but deliberate in order to deprive him of costs for his failure to avail himself of the provisions of Order 22 rules 1 to 3.

I am prepared to concede that the word "claim" in rule 3 does not include or cover a prayer for costs of a suit but I cannot agree with the proposition that the court's discretion to award costs is fettered by the provisions of Order 22 rule 2(3).

In my opinion the court's discretion to award costs under Order 65 rule 1 can only be taken away in respect of a particular proceeding by a specific rule enacted for that purpose and not by any supposed rule, the existence of which is to be inferred by a tortuous process of mental gymnastics.

From the English authorities cited before me, the general rule in regard to costs in proceedings of this nature appears to be that the plaintiff is entitled to costs up to the date of payment in and the defendant the costs after that date. I see no reason in this case to depart from that practice. I order accordingly.

Mr. Sharma further applied for an order that the taxed costs of the defendant should be first paid out of the money in court before payment is made to the plaintiff. I think that the proper order should be that the defendant's costs be set-off against the plaintiff's costs. I order accordingly.

Order accordingly.

Solicitors: *Dharmananda & Co.; N. Sharma.*

OH HIAM & ORS. v. THAM KONG

[O.C.J. (Gill J.) August 18, 1966]

[K.L. — Civil Suit No. 366 of 1958]

Contract — Transfer of land — Common mistake — Power of court to order rectification of agreement and of transfer — Land Code (Cap. 138), s. 42 — Specific Relief (Malay States) Ordinance, 1950, s. 32.*

In this case the parties had entered into a contract for the sale of certain lands at Gombak but by a mistake common to both parties the written agreement and the transfer dealt not only with the lands agreed to be sold but also a piece of land at Setapak. The plaintiffs applied to set aside the transfer of the land at Setapak.

Held: (1) the agreement in this case was not a nullity and the court could in equity order rectification of the agreement;

(2) the rules of equity pertaining to rectification were applicable although the transfer of the land had been registered under the Land Code.

Cases referred to:—

(1) *Couturier* v. *Hastie* (1856), 5 H.L. Cas. 673.

(2) *Cooper* v. *Phibbs* (1867), L.R. 2 H.L. 149.

(3) *Bell* v. *Lever Brothers* [1932] A.C. 161.

(4) *Huddersfield Banking Co. Ltd.* v. *Henry Lister and Son Ltd.* [1895] 2 Ch. 273.

(5) *Lovell and Christmas Ltd.* v. *Wall* (1911), 104 L.T. 85, 88.

(6) *Frederick E. Rose (London) Ltd.* v. *William H. Pim & Co. Ltd.* [1953] 2 Q.B. 450, 461.

(7) *Craddock Brothers Ltd.* v. *Hunt* [1923] 2 Ch. 136.

(8) *Loke Yew* v. *Port Swettenham Rubber Company Ltd.* [1913] A.C. 491.

(9) *Wilkins & Ors.* v. *Kannammal & Anor.* [1951] M.L.J. 99.

(10) *Lim Hong Shin* v. *Leong Fong Yew* (1918), 2 F.M.S.L.R. 187, 188.

CIVIL SUIT.

S. D. K. Peddie for the plaintiffs.

J. H. Yong for the defendant.

Cur. Adv. Vult.

Gill J.: This is an action to set aside a transfer made in 1958 to the defendant by Oh Hiam, the lawful widow and administratrix of the estate of Teoh Teow Guan deceased, of land held under E.M.R. 5339 for Lot 3660 in the Mukim of Setapak, which formed part of the assets of the said estate. The action was commenced by Oh Hiam as first plaintiff with eight other plaintiffs who, as the children of the said deceased, are the other beneficiaries of the estate. As Oh Hiam died before the action came up for trial, the second and seventh plaintiffs, who are the present administrators (*de bonis non*) of the estate, were substituted in her place as first plaintiffs.

The events leading to the transfer were as follows. By an agreement in writing dated the 30th day of September, 1956 Oh Hiam as representative agreed to sell and the defendant agreed to purchase the several pieces of land comprised in and held under E.M.R. 4139, 4140, 5339, 4219, 4079, 5634 and 5633 for Lots 2663, 2664, 3660, 2771, 2562, 1538 and 1537 respectively, in the Mukim of Setapak, Kuala Lumpur at an agreed price of $450 per acre. Under the agreement, pending the execution of a registrable transfer, the vendor was to deposit the title deeds to the land, and the purchaser to deposit $5,000 by way of part payment of the purchase price of the land, with Mr. Y. S. Lee, an advocate and solicitor, at whose office the agreement was prepared and executed. The purchaser was at liberty to enter into possession of the said lands with effect from the 1st day of October, 1956 and to take any profits which may be derived from the produce thereof and/or be liable for any losses, and the vendor undertook within a reasonable time to make the requisite application to the court for leave to sell the said lands to the purchaser or his nominee or nominees.

On 1st August, 1957 Oh Hiam made an application to this court in Originating Summons

* This section corresponds to section 340 of the National Land Code, 1965.